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10 Attorneys for Plaintiffs and Counter-Defendants
 11 LENSCRAFTERS, INC. and EYEXAM OF CALIFORNIA, INC.

12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 OAKLAND DIVISION

16 LENSCRAFTERS, INC.; and EYEXAM OF
 17 CALIFORNIA, INC.,

18 Plaintiffs,

19 v.

20 LIBERTY MUTUAL FIRE INSURANCE
 21 COMPANY; EXECUTIVE RISK SPECIALTY
 22 INSURANCE COMPANY; UNITED STATES
 23 FIRE INSURANCE COMPANY; MARKEL
 24 AMERICAN INSURANCE COMPANY; and
 25 WESTCHESTER FIRE INSURANCE
 26 COMPANY,

27 Defendants,

28 AND RELATED COUNTER-AND CROSS-
 CLAIMS.

Case No.: C-07-2853 SBA

**PLAINTIFFS AND COUNTER-
 DEFENDANTS LENSCRAFTERS,
 INC. AND EYEXAM OF
 CALIFORNIA, INC.'S ANSWER TO
 MARKEL AMERICAN
 INSURANCE COMPANY'S
 COUNTERCLAIM; DEMAND FOR
 JURY TRIAL**

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 30 Plaintiffs and Counter-Defendants LensCrafters, Inc. and EYEXAM of California,
 31 Inc. (together "LensCrafters"), by and through their counsel, answer Defendant and Cross-
 32 Complainant Markel American Insurance Company's ("Markel") Counterclaim (the
 33

1 “Counterclaim”) in this action, as follows:

2 1. In answer to paragraph 1 of the Counterclaim, LensCrafters admits that this
 3 action concerns indemnification that defendant insurers owe to LensCrafters for the
 4 referenced litigation (the “*Snow Action*”).

5 2. LensCrafters lacks information and knowledge sufficient either to admit or
 6 deny the allegations contained in paragraph 2 of the Counterclaim.

7 3. LensCrafters lacks information and knowledge sufficient either to admit or
 8 deny the allegations contained in paragraph 3 of the Counterclaim.

9 4. LensCrafters admits the allegations contained in paragraph 4 of the
 10 Counterclaim.

11 5. LensCrafters admits the allegations contained in paragraph 5 of the
 12 Counterclaim.

13 6. LensCrafters lacks information and knowledge sufficient either to admit or
 14 deny the allegations contained in paragraph 6 of the Counterclaim.

15 7. LensCrafters lacks information and knowledge sufficient either to admit or
 16 deny the allegations contained in paragraph 7 of the Counterclaim.

17 8. LensCrafters lacks information and knowledge sufficient either to admit or
 18 deny the allegations contained in paragraph 8 of the Counterclaim.

19 9. LensCrafters lacks information and knowledge sufficient either to admit or
 20 deny the allegations contained in paragraph 9 of the Counterclaim.

21 10. LensCrafters admits the jurisdictional allegations contained in paragraph 10 of
 22 the Counterclaim. Except as specifically admitted, LensCrafters responds that the
 23 allegations in the cross-claim speak for themselves and accordingly, denies the allegations
 24 in paragraph 10 of the Counterclaim.

25 11. In answer to paragraph 11 of the Counterclaim, LensCrafters responds that the
 26 allegations in the complaint in the *Snow Action* speak for themselves.

27 12. In answer to paragraph 12 of the Counterclaim, LensCrafters responds that the
 28 complaint and amended complaints in the *Snow Action* speak for themselves.

1 13. In answer to paragraph 13 of the Counterclaim, LensCrafters admits that
2 Markel issued Commercial Umbrella Liability Policy No. CU-GA-1345-01 (the “Markel
3 Policy”) for the referenced time period. LensCrafters further admits that Luxottica U.S.
4 Holdings Corporation is one of the insureds under the Markel Policy. Except as specifically
5 admitted, LensCrafters denies the allegations contained in paragraph 13 of the
6 Counterclaim.

7 14. In answer to paragraph 14 of the Counterclaim, LensCrafters admits that
8 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under
9 commercial general liability policies issued by Liberty Mutual Fire Insurance Company (the
10 “Liberty Policies”) for eight consecutive annual policy periods from February 1, 1998
11 through February 1, 2006; LensCrafters further admits that each of the Liberty Policies has
12 liability limits for personal injury coverage of \$3 million each occurrence and \$6 million in
13 the aggregate. Except as specifically admitted, LensCrafters denies the allegations
14 contained in paragraph 14 of the Counterclaim.

15 15. In answer to paragraph 15 of the Counterclaim, LensCrafters admits that
16 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under a
17 Managed Care Organization Errors and Omissions Liability Policy issued by ERSIC (the
18 “ERSIC Policy”) for the period November 12, 2001 to November 12, 2002; LensCrafters
19 further admits that the ERSIC Policy has limits of liability of \$3 million for each Claim (as
20 defined in the ERSIC Policy) or Related Claim (as defined in the ERSIC Policy) and \$3
21 million in the aggregate. Except as specifically admitted, LensCrafters denies the
22 allegations contained in paragraph 15 of the Counterclaim.

23 16. In answer to paragraph 16 of the Counterclaim, LensCrafters admits
24 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under three
25 commercial umbrella policies issued by U.S. Fire (the “U.S. Fire Policies”) for three
26 consecutive annual policy periods from February 1, 1998 to February 1, 2001; LensCrafters
27 further admits that each of the U.S. Fire Policies has liability limits of liability for personal
28 injury coverage of \$25 million in excess of the retained limit for each occurrence and in the

1 aggregate. Except as specifically admitted, LensCrafters denies the allegations contained in
2 paragraph 16 of the Counterclaim.

3 17. In answer to paragraph 17 of the Counterclaim, LensCrafters admits that
4 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under
5 commercial umbrella policies issued by Westchester effective February 1, 2002 to February
6 1, 2006 (the “Westchester Policies”); LensCrafters further admits that the Westchester
7 Policies have liability limits for personal injury coverage of \$25 million in excess of the
8 retained limit per occurrence and in the aggregate. Except as specifically admitted,
9 LensCrafters denies the allegations contained in paragraph 17.

10 18. In answer to paragraph 18 of the Counterclaim, LensCrafters admits that
11 LensCrafters, Inc. and EYEXAM of California, Inc. were plaintiffs in litigation entitled
12 *LensCrafters, Inc. v. Liberty Mutual Fire Ins. Co.*, United States District Court, Northern
13 District of California, Case No. C 04-1001 SBA, which litigation speaks for itself.

14 19. Paragraph 19 of the Counterclaim alleges the substance of the Court’s orders
15 in Case No. C 04-1001 SBA, which speak for themselves.

16 20. Paragraph 20 of the Counterclaim alleges the substance of the Court’s orders
17 in Case No. C 04-1001 SBA, which speak for themselves.

18 21. Paragraph 21 of the Counterclaim alleges the substance of a stipulation and
19 order entered in Case No. C 04-1001 SBA, which speaks for itself. LensCrafters
20 specifically denies that the parties stipulated to dismiss the prior coverage action.

21 22. In answer to paragraph 22 of the Counterclaim, LensCrafters incorporates its
22 answers to paragraphs 1 through 21 inclusive.

23 23. LensCrafters lacks information and knowledge sufficient either to admit or
24 deny the allegations contained in paragraph 23 of the Counterclaim.

25 24. LensCrafters lacks information and knowledge sufficient either to admit or
26 deny the allegations contained in paragraph 24 of the Counterclaim.

27 25. LensCrafters denies the allegations contained in paragraph 25 of the
28 Counterclaim.

1 26. LensCrafters lacks information and knowledge sufficient either to admit or
2 deny the allegations contained in paragraph 26 of the Counterclaim.

3 27. In answer to paragraph 27 of the Counterclaim, LensCrafters responds that the
4 allegations of the Counterclaim and cross-claim speak for themselves.

5 28. In answer to paragraph 28 of the Counterclaim, LensCrafters admits that there
6 is a present active controversy between LensCrafters, Inc. and EYEXAM of California,
7 Inc., on the one hand, and defendant insurers, on the other hand, concerning their respective
8 rights and obligations under their respective insurance policies to indemnify LensCrafters
9 for the claims asserted in *Snow* and that a declaration of rights and obligations by the Court
10 is appropriate at this time. Except as specifically admitted, LensCrafters denies the
11 allegations in paragraph 28 of the Counterclaim.

AFFIRMATIVE DEFENSES

13 By way of Affirmative Defenses, LensCrafters alleges as follows:

First Affirmative Defense

15 The Counterclaim fails to state facts sufficient to constitute a claim against
16 LensCrafters upon which relief can be granted.

Second Affirmative Defense

18 The Counterclaim is barred in whole or in part by the doctrine of laches.

Third Affirmative Defense

20 The Counterclaim is barred in whole or in part by the doctrine of unclean hands.

Fourth Affirmative Defense

22 The Counterclaim is barred in whole or in part by the doctrine of waiver.

Fifth Affirmative Defense

24 The Counterclaim is barred in whole or in part by the doctrine of estoppel.

Sixth Affirmative Defense

26 The Counterclaim is barred in whole or in part by the applicable statute of
27 limitations.

Seventh Affirmative Defense

1 Markel is barred in whole or in part from any recovery because it has breached the
2 terms and conditions of the Markel Commercial Umbrella Liability Policy including, but
3 not limited to, the failure to settle the *Snow* Action and the failure to indemnify
4 LensCrafters in the *Snow* Action.

Eighth Affirmative Defense

6 Markel is barred in whole or in part from recovery because it has engaged in
7 improper, retaliatory and bad faith conduct against LensCrafters including, but not limited
8 to, unreasonable failure to comply with the terms of the Markel Commercial Umbrella
9 Liability Policy, denying coverage for the *Snow* Action without any reasonable basis to do
10 so, failing to undertake a reasonable and thorough investigation of the claims against
11 LensCrafters in the *Snow* Action, failing to fund a reasonable settlement of the *Snow*
12 Action, and placing its own interests above the interests of its insured.

Ninth Affirmative Defense

14 The Counterclaim does not state a claim that is ripe for adjudication to the extent that
15 it seeks to add claims in addition to those at issue in Plaintiffs' Complaint for Declaratory
16 Relief or any amendments thereto.

PRAYER FOR RELIEF

18 WHEREFORE LensCrafters requests this Court to enter judgment as follows:

19 1. For a declaration that Markel has a duty to indemnify LensCrafters with
20 respect to any judgment or settlement in the *Snow* Action;

21 2. For an award to LensCrafters of its attorneys' fees and costs of suit; and

22 3. For such other and further relief as the Court may deem just and appropriate.

23 DATED: August 20, 2007 HELLER EHRMAN LLP

By /s/ *Celia M. Jackson*

Celia M. Jackson

Attorneys for Plaintiffs and Counter-Defendants
LENSCRAFTERS, INC. and EYEXAM OF
CALIFORNIA, INC.

1 **DEMAND FOR JURY TRIAL**

2 Plaintiff and Counter-Defendants LensCrafters, Inc. and EYEXAM of California,
3 Inc. hereby demand trial by jury.

4 DATED: August 20, 2007 **HELLER EHRLMAN LLP**

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6 By /s/ Celia M. Jackson

7 Celia M. Jackson

8 Attorneys for Plaintiffs and Counter-Defendants
9 LENS CRAFTERS, INC. and EYEXAM OF
CALIFORNIA, INC.

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